Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 94-495

In The

Supreme Court of the United States

October Term, 1994

ROGER F. QUISENBERRY,

Petitioner,

v.

JACK M. BERK, Trustee and
MILTON T. BAUER, CLERK OF THE
CIRCUIT COURT OF PALM
BEACH COUNTY, FLORIDA,

Respondents.

On Petition For Writ Of
Certiorari To The Florida Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION REFERENCES

Throughout Respondent's Brief in Opposition, Petitioner, ROGER F. QUISENBERRY, shall be referred to as either "QUISENBERRY" or "PETITIONER" and references to Respondent, JACK M. BERK, TRUSTEE, shall be referred to as either "BERK" or "RESPONDENT". References to Respondent, MILTON T. BAUER, CLERK OF THE CIRCUIT COURT OF PALM BEACH COUNTY, FLORIDA, shall be referred to as "CLERK". References to Petitioner's Appendix shall be referred to as "PET. APP.-___".

STATEMENT OF THE CASE

The Statement of the Case provided by QUISENBERRY in his Petition for Writ of Certiorari contains inaccurate statements of fact. Specifically, QUISENBERRY states that the subject property was sold for failure to pay $277.54 in taxes for the calendar year 1984. Although the Tax Certificate (PET.APP.-16) reflects said amount was due and owing. The Notice of Application for Tax Deed upon which the subject property was sold reflects that real estate taxes for the years 1988 and 1989 in the amount of $4,098.37 remained unpaid. Further, the Notice of Application for Tax Deed stated that same was subject to 1991 taxes. APP.-2.

Contrary to QUISENBERRY's assertions, the Clerk did not attempt to send notice of the tax sale by certified mail, but did send notice of the tax sale by certified mail. QUISENBERRY neglects to inform this Court that the certified mail return receipt was marked "unclaimed". PET. APP.-7.

Further, the Affidavit of the Clerk reflects that notice of the tax sale was also sent to QUISENBERRY at this Conniston Road address. APP.-3. Therefore, although there is nothing in the record to reflect that QUISENBERRY received the notice by certified mail, same was sent by the Clerk at two (2) different addresses.

Finally, QUISENBERRY incorrectly states that the Clerk attempted personal service on QUISENBERRY. First, this is incorrect because the Sheriff of Palm Beach County is responsible for personal service and, more importantly, the Palm Beach County Sheriff's original return of service unambiguously reflects that

QUISENBERRY was personally served with the Notice of Application for Tax Deed with warning and copy. PET. APP.-18. Thus, QUISENBERRY's argument that his due process has been violated is flawed in that his Statement of Case contains blatantly inaccurate facts.

An additional fact worth noting is the amount paid by BERK for the Tax Deed. BERK was the successful bidder at the subject tax sale for the bid amount of $30,000.00. This fact is relevant whereas QUISENBERRY has argued that property has been taken without compensation. This argument is without merit because the subject property goes to auction and the highest bidder receives the tax deed. Therefore, QUISENBERRY cannot argue that the property is taken without compensation because the Clerk's records reflect that after payment of all applicable taxes and a Solid Waste Authority lien, a balance as of September 13, 1993 of $24,330.71 remained in the Clerk's Registry to be disbursed to QUISENBERRY upon Court Order. APP.-4.

SUMMARY OF THE ARGUMENT

QUISENBERRY's due process rights were not violated. First, all property owners are charged with the knowledge that real estate taxes are due and payable annually. Second, the Property Appraiser's Office sends a proposed property tax bill, a final property tax bill and delinquent notices when property taxes have not been paid in any calendar year. QUISENBERRY makes no argument that these notices were not sent or received. Third, when a Tax Certificate is sold for the non-payment

of taxes, the property owner is notified of the Tax Certificate Sale and no Application for Tax Deed can be made for a period of two (2) years. Therefore, QUISENBERRY had two (2) years beginning June 1, 1989 to pay his taxes. QUISENBERRY did not pay taxes on the subject property in 1984, 1988, 1989 or 1991. Therefore, he cannot argue he was unaware that taxes were due on the subject property. Finally, QUISENBERRY argues that actual notice must be received to afford property owners due process. This argument must fail for there to be finality in the ad valorem taxation process. Specifically, if any State adopted an "actual notice" policy, no tax deed would be valid. After the auction and issuance of a Tax Deed, any property owner could sue the tax deed holder arguing that there was no "actual notice" and despite apparent evidence to the contrary. For example, if a Sheriff filed an affidavit of service reflecting that the legal property owner had been personally served with the Notice of Application for Tax Deed, this in and of itself would be insufficient to constitute actual notice if this Court were to adopt QUISENBERRY's argument.

Any property owner seeking to void a tax deed would simply state that he/she was not personally served despite the Sheriff's affidavit to the contrary and could argue that the signature on the certified mail return receipt form, which was received by the Clerk's office was a forgery. This is exactly what QUISENBERRY is arguing in the case at bar. The Sheriff's affidavit (PET.APP.-18) specifically states that QUISENBERRY was personally served. However, QUISENBERRY contested the Sheriff's assertion arguing that it was not him who was served with the Notice of Application for Tax Deed.

For these obvious reasons, "actual notice" cannot be assured. Further, requiring "actual notice" would severely prejudice the State's interest in generating revenue where property owners are deceased, out of the country, or have otherwise elected to abandon their property.

The procedures in place for attempting to notify a property owner of an Application for Tax Deed meet the due process requirements of the United States Constitution as interpreted by this Court and the Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. THE PALM BEACH COUNTY CLERK'S OFFICE SENT NOTICE OF THE TAX SALE TO MR. QUISENBERRY'S RESIDENCE.

Contrary to QUISENBERRY's assertion, certified mail, return receipt requested notice was sent to QUISENBERRY at his residence address and at another address which the Clerk had on record. The return receipt came back to the Clerk "unclaimed". PET.APP.-5. However, this does not mean that QUISENBERRY did not receive notice, but rather that he simply failed to claim same.

Further, although QUISENBERRY argued below that he was out of town on the date the Palm Beach County Sheriff's Department allegedly personally served him, he never argued that he was out of town on the first two (2) dates in which the Post Office attempted to deliver the

certified mail notice. Accordingly, QUISENBERRY's failure to claim the certified mail notice or otherwise act to confirm the property tax status resulted in him losing the subject property. This Court has consistently held that notice by mail is an effective means of affording due process. In *Greene v. Lindsey*, 456 U.S. 444 (1982), where this Court declared that posting a forcible entry and detainer action did not satisfy the standards of due process, Justice Brennan stated,

> As noted by the Court of Appeals, and as we noted in *Mullane*, the mail provides an efficient and inexpensive means of communications. *Id.* at 319, 70 S.Ct. at 659, upon which prudent men will ordinarily rely in the conduct of important affairs, *Id.* at 319-320, 70 S.Ct. at 659. Notice by mail under the circumstances of this case would surely go a long way toward providing the constitutionally required assurance that the State has not allowed its power to be invoked against a person who has had no opportunity to present a defense despite a continuing interest in the resolution of a controversy. Particularly where the subject matter of the action also happens to be the mailing address of the Defendant, and where personal service is ineffectual, notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings.

Although this Court did not discuss what happens when the mailed notice is allegedly unclaimed or not received, this Court has consistently held that notice by mail satisfies constitutional due process. Also, see *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983).

The constitutionality of § 197.522, Florida Statutes (1987), was recently upheld by the Florida Supreme Court in *Saada v. Dawson*, 608 So.2d 808 (Fla. 1992), where in Footnote 1, the Florida Supreme Court stated,

> The record does not indicate whether the owners actually received notice because the notice was not mailed to their present residence. However, Section 197.522(1)(d), Florida Statutes (1987), specifically provides that "failure of anyone to receive notice as provided herein shall not affect the validity of the tax deed issued pursuant to the notice." Thus, the relevant issue is whether the Clerk complied with the notice provisions, not whether the owner actually received notice.

In upholding the validity of the Tax Deed, the Florida Supreme Court held,

> A land owner whose property is to be sold for delinquent taxes undoubtedly has a vested ownership interest in the subject property and is therefore entitled to notice of a pending tax deed sale . . . However, we do not agree with *Saada's* contention that due process requires strict compliance with the notice provisions in both subsections of Section 197.522. In any proceeding which is to be accorded finality, due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) . . .
>
> Florida's statutory scheme governing the sale of real property for the collection of delinquent

> taxes and the validity of tax deeds issued pursuant to such sales is comprehensive. The notice provisions contained in Chapter 197 are an integral part of that scheme. *Section 197.522(1) meets constitutional due process requirements by mandating notice reasonably calculated to apprise land owners of the pending deprivation of their property . . .* (emphasis added).

That whereas the Clerk's office sent notice of the pending tax sale to QUISENBERRY at two (2) addresses, his due process rights were not violated and the Petition for Writ of Certiorari should be denied.

II. THE PALM BEACH COUNTY SHERIFF'S DEPARTMENT PERSONALLY SERVED MR. QUISENBERRY WITH THE NOTICE OF TAX SALE.

The Palm Beach County Sheriff's original return reflects that QUISENBERRY was personally served on December 18, 1991 with a certified copy of the Notice of Application for Tax Deed with warning and copy. PET.APP.-18-20. This fact alone renders QUISENBERRY's Petition for Writ of Certiorari moot. QUISENBERRY argued below that he was out of town on the alleged service date and therefore, was not the person who the Sheriff believed to be serving. However, this argument is exactly why "actual notice" cannot be a prerequisite to uphold the validity of tax deeds. Every property owner, whether receiving notice or not, could argue that notice was not received and be entitled to void the subject tax deed. Of course, there would be a trial to determine whether or not the notice was received, however, such a requirement would completely thwart Florida's ability to

collect taxes. In *Saada, supra,* the Florida Supreme Court stated,

> As Judge Wiggington noted, under early common law every presumption was against the validity of a tax sale, and one claiming title under such a sale had to prove strict compliance with the appropriate statutory provisions. However, under this common-law approach, tax titles were very difficult to establish, and the State was consequently hampered in its ability to collect taxes . . . In response to this dilemma, legislatures passed statutes relaxing the strict common law requirements regarding proof of validity of tax sales. Courts have responded in kind by regarding many provisions as directory only . . .

The concerns and issues raised by QUISENBERRY in his Petition for Writ of Certiorari have existed since the establishment of Florida law regarding the collection of taxes. The Florida legislature and Florida Courts have paid close attention to this Court's holding in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). QUISENBERRY and BERK agree that the principals enunciated in *Mullane, supra,* relating to the requirements of due process are well founded. However, the Florida legislature and the Florida Supreme Court have concluded that Section 197.522, Florida Statutes (1987) provides notice "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Id.* at 314. Therefore, and assuming that the Florida Supreme Court had not determined that personal service by the Sheriff was directory only (see *Saada,*

supra), the record reflects that QUISENBERRY was personally served rendering his Petition for Writ of Certiorari moot.

Even if the Sheriff served a house guest who was staying at QUISENBERRY's home doing handy work rather than QUISENBERRY, this attempt to provide notice should be preferred. The house guest filed an Affidavit (APP.-5,6) which states in pertinent part,

> I was inside the house, cleaning, when the doorbell rang. I went to the door, opened it slightly, and a man at the door said "I've got some papers here for you", or something to that effect. I took the papers, didn't read them, and put them on the desk. The man never identified himself as a Sheriff and never asked me who I was, nor for identification, or whether or not I was Roger Quisenberry.

Irrespective that the Florida Supreme Court had determined in *Saada, supra,* that personal service by the Sheriff was directory only, the Trial Court concluded that serving the house guest (whether said service was in accordance with Florida law or not) was a better means of insuring notice than posting. QUISENBERRY would argue that the Sheriff should have knocked on the door, advised who he was, asked whether the individual was Mr. Quisenberry and, if not, ask the individual to close the door so the Sheriff could post same on the house. This argument is simply without logic. Further, this Court in *Greene, supra,* determined that posting writs of forcible entry and detainer does not satisfy the minimum standards of due

process because said notices were often removed by children or other tenants in the building. In so holding, this Court stated,

> Of course, the reasonableness of the notice provided must be tested with reference to the existence of "feasible and customary" alternatives and supplements to the form of notice chosen . . .

In the case at bar, handing the notice to a house guest who placed same "on [Quisenberry's] desk" is certainly a preferred method of notice rather than posting.

III. FLORIDA LAW PERTAINING TO THE ISSUANCE OF TAX DEEDS DOES NOT VIOLATE DUE PROCESS.

PETITIONER cites *Mullane, supra,* to support his due process argument. However, reading *Mullane, supra,* together with Section 197.522, Florida Statutes (1987) reflects that said Statute meets the constitutional due process requirements whereas Florida has attempted to insure notice and opportunity to be heard by requiring the Clerk to send certified mail, return receipt requested, notice of a pending tax sale to the persons listed in the tax collector's statement, to publish notice of a pending tax sale and provide the Sheriff of the County in which the legal title holder resides notice of the tax sale to serve upon the property owner. The statutory schemework created by the State of Florida to provide notice of pending tax sales meet the fundamental requirements of due process as stated by this Court in *Mullane, supra,* and its progeny.

In addition, the facts of this case show that Section 197.522, Florida Statutes (1987) as applied to QUISENBERRY do not violate his due process rights and although it is unfortunate his property was lost, the State of Florida provided more than "notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their exceptions." *Id.* at 657.

The loss of QUISENBERRY's property is a direct result of his failure to pay taxes and properly protect his interests. In *Mullane, supra,* this Court quoted Justice Marshall in stating,

> It is the part of common prudence of all those who have any interest in [a thing], to guard that interest by persons who are in a situation to protect it.

Id. at 658. It was QUISENBERRY's lack of due diligence, not the State of Florida's violation of due process, which caused the loss of QUISENBERRY's property. Accordingly, Section 197.522, Florida Statutes (1987) as applied to QUISENBERRY is constitutional and this Court should deny PETITIONER's request for the issuance of a Writ of Certiorari.

QUISENBERRY also cites *Fuentes v. Shevin,* 407 U.S. 67 (1972) in support of his due process argument. However, the facts of *Fuentes, supra,* are completely inapplicable to the case at bar. In *Fuentes, supra,* this Court determined that Florida's Replevin Statute was unconstitutional and held,

> We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possession. Our holding, however, is a narrow one . . . Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivation of property, however, it is axiomatic that the hearing must provide a real test. "[D]ue process is afforded only by the kinds of 'notice' and 'hearing' that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property . . . "

In the present case, Florida provides many mechanisms of notice which are designed to inform its citizens that their property may be lost if they fail to pay real estate taxes. These notices include, but are not limited to, certified mail notice, publication notice, regular mail notice in the form of property tax bills and delinquent notices and personal service, if the owner resides in the County where the subject property is located. Thus, the holding in *Fuentes, supra,* is simply inapplicable.

Contrary to QUISENBERRY's assertions as set forth on Page 7 of his Petition for Writ of Certiorari, the test this Court formulated in *Matthews v. Eldridge,* 424 So.2d U.S. 319 (1976), when applied to the case at bar, reflects that Florida law complies with constitutional due process. Although the interest of a land owner in keeping his property is great, the risk of a wrongful deprivation of said interest is slight and Florida has many procedural

safeguards to ensure an owner is notified that his property may be lost for failure to pay taxes. Finally, the State's interest in obtaining revenue is substantial, and for the tax deed process to have finality, "actual notice" is impossible. QUISENBERRY simply failed to protect his interest, and is charged with the knowledge that real estate taxes are payable annually.

QUISENBERRY argues on Page 9 of his Petition that additional forms of notice should be required to ensure property owners are aware of pending tax sales. However, this argument is unpersuasive whereas Florida law provides many forms of notice which meet the due process requirements of the Constitution as interpreted by this Court.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied and RESPONDENT requests that costs be taxed against PETITIONER.

Respectfully submitted,

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Suite 302
980 North Federal Highway
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(407) 391-5506
Florida Bar No. 798266

NOTICE OF APPLICATION FOR TAX DEED

NOTICE IS HEREBY GIVEN, that 1982 TRUST FOR JESSICA LYNN ISRAEL the holder of the following certificate has filed said certificate for a tax deed to be issued thereon. The certificate number and year of issuance, the description of the property, and the names in which it was assessed are as follows:

Certificate No. 16112 Year of Issuance JUNE 1, 1989

Description of Property PALM BEACH RANCHES (UNREC)

LT 1 BLK 4

00-42-45-10-01-004-0010

Name in which assessed ROGER F QUISENBERRY

Said property being in the County of PALM BEACH, State of Florida.

Unless such certificate shall be redeemed according to law the property described in such certificate shall be sold to the highest bidder at the courthouse door on the 15th day of JANUARY, 1992.

IN COURTHOUSE LOBBY, 2ND STREET ENTRANCE AT 11:00 A.M.

Dated this 10th date of DECEMBER, 1991.

SUBJECT TO 1991 TAXES

Signature: /s/ John B. Dunkle (SEAL)

Clerk of Circuit Court of PALM BEACH County, Florida

PUBLISH: DEC. 10,17,24,31, 1991

DELINQUENT REAL ESTATE TAXES
DUE FOR THE YEARS: 1988,1989

TOTAL AMOUNT TO BE REDEEMED: $ 4,098.37

OR8 7089 Pg 60

STATE OF FLORIDA

COUNTY OF PALM BEACH

I, JOHN B. DUNKLE, Clerk of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, State of Florida, do hereby certify that I, the Clerk, did on the 10th day of December, 1991 mail a copy of notice addressed to:

ROGER F QUISENBERRY, 325 CONNISTON ROAD, WEST PALM BEACH, FLORIDA
THOMAS A & AGNES H EVELYN, 6032 WESTERN WAY, LANTANA, FL
SOLID WASTE AUTHORITY, P.O. BOX 24693, WEST PALM BEACH, FLORIDA 33416
FLORIDA HASCO INC, % KENT HUFFMAN ESQ. 251 ROYAL, PALM WAY # 211, PALM BEACH, FL 33480
THOMAS FRANK MAGESTRO, 139 N 12TH AVENUE, LANTANA, FL
W W & WILMA THOMSON, % MR L D NOBLE, P.O. BOX 352, HUDSON, OH
ROGER F QUISENBERRY, 5421 S FLAGLER DRIVE, WEST PALM BEACH, FL 33405
LAKE WORTH DRAINAGE DIST. 13081 MILITARY TRAIL, DELRAY BEACH, FL 33445
TRUST JESSICA LYNN ISRAEL, P.O. BOX 403006, MIAMI BEACH, FL 33140
EVERGLADES FEDERAL S & L, 125 N MAIN STREET, BELLE GLADE, FL 33430

JOHN B. DUNKLE

CLERK OF THE CIRCUIT COURT

BY: /s/ Tamara T. Stambaugh
Deputy Clerk (SEAL)

Clerk Circuit Court
Palm Beach County, Florida

Tax Deed Sales ■ Box 484 ■ West Palm Beach, Florida 33402-0484 ■ (407) 355-2962

REPLY TO: TAMARA T. STAMBAUGH

CERTIFICATE NUMBER 16112 '89

TAX DEED SALE: JANUARY 15, 1992

AS OF SEPTEMBER 13, 1993, THE FOLLOWING CONTAINS ALL DISBURSEMENTS AND BALANCES OF THE OVERBID CONCERNING THE ABOVE REFERENCED CERTIFICATE.

BEGINNING BALANCE:	JANUARY 15, 1992	30,000.00
CK 6790 TO JESSICA ISRAEL	JANUARY 21, 1992	4,098.37
SOLID WASTE AUTHORITY	SEPTEMBER 13, 1993	1,570.92

REMAINING BALANCE TO ~~DATE~~: 24,330.71

DOROTHY H. WILKEN
CLERK OF THE CIRCUIT COURT
BY: /s/ Tamara T. Stambaugh
DEPUTY CLERK

EXHIBIT D

AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

BEFORE ME, the undersigned authority, personally appeared Joseph T. Osterby who, being by me first duly cautioned and sworn, upon his oath deposes and says:

1. My name is Joseph T. Osterby and I reside at 61 Arch Drive, Lake Worth, Florida 33467. I am over the age of 18 years and the following is based on my personal knowledge.

2. I have been an employee of Roger Quisenberry for the past twenty five years, off and on, doing general maintenance and repair work.

3. On December 18, 1991, I was working at Mr. Quisenberry's house while Mr. Quisenberry was out of town, staying there overnight. Before that date, the last time I stayed at his house for the same reasons was eight months before.

4. I was inside the house, cleaning, when the door bell rang. I went to the door, opened it slightly and a man at the door said "I got some papers here for you", or something to that effect. I took the papers, didn't read them, and put them on the desk. The man never identified himself as a sheriff and never asked me who I was, nor for identification, or whether or not I was Roger Quisenberry.

5. On or about January 15, 1992, Brenda Brown, a tenant of Mr. Quisenberry's at the 6032 Western Way